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No. 92-960

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS D. McAUSLAND and
CHRISTOPHER PAFORT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF ELECTRONIC INDUSTRIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 U.S.C. §641) or wire fraud (18 U.S.C. §1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom, or practice.

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BRIEF OF ELECTRONIC INDUSTRIES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief amicus curiae of the Electronic Industries Association is filed with the consent of the parties and in support of petitioners, as provided for in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The Electronic Industries Association (EIA) is a trade association comprised of companies involved in the design, manufacture, distribution and sale of electronics parts, components, equipment and systems. Many of these member companies are contractors to the federal government. Consequently, EIA is active in legal matters which impact on the government procurement process.

Amicus EIA is concerned that the prosecution's theory in this case will chill the exchange of information that is a natural and important part of contracting with the federal government. Free and constant communication between contractors and their government customers is essential to the government's procurement of goods and services. This case involves the prosecution of a private citizen for obtaining unclassified information about a procurement. The prosecution's theory imposes criminal sanctions on any individual who fails to successfully navigate the welter of unpublished internal government rules, customs, and practices regarding the disclosure of information. As such, this case threatens the free flow of information that lies at the heart of the government procurement process.

For this reason, amicus EIA believes that this case is of exceptional importance. Amicus has followed this case closely and filed briefs before the United States Court of Appeals for the Fourth Circuit. EIA believes that as the representative for numerous private contractors, it brings a unique perspective to this case. As a participant in government contracting, amicus EIA can show how this prosecution will gravely harm the effective workings of the government procurement process and runs counter to well established law.

REASONS FOR GRANTING THE PETITION

In this case, petitioners Thomas D. McAusland and Christopher M. Pafort challenge their conviction for theft of government property under 18 U.S.C. §641 (and related wire fraud and conspiracy counts) for obtaining unclassified government information in connection with certain government procurements. McAusland and Pafort were marketing executives at Litton Data Systems. The two Litton marketing executives were *not* charged with using unlawful means to obtain this information from government officials. There was no allegation that appellants bribed or blackmailed any official or stole any document in connection with obtaining this information. Nor was there any

allegation that the disclosure of this government information violated any published rule, regulation or statute. Rather, the defendants were convicted solely because unpublished, internal government policies and practices prohibited the disclosure of this information.

This prosecution presents a novel theory of criminal liability. The courts of appeals are split as to whether an information can be considered a "thing of value" within the reach of section 641. *Compare, e.g., United States v. Tobias*, 836 F.2d 449, 451, (9th Cir.), *cert. denied*, 485 U.S. 991 (1988) ("section 641 should not be read to apply to intangible goods") *with United States v. Fowler*, 932 F.2d 306, 309-10 (4th Cir. 1991) (rejecting Ninth Circuit's interpretation). Moreover, no court prior to this case had extended criminal liability to cover the receipt of information in the absence of a statute or regulation prohibiting dissemination of the information. As a result, the ruling below expands the criminal law into new areas, with potentially far-reaching and dangerous ramifications.

Section 641 prohibits the conversion, conveyance or disposal of government property "without authority." The phrase "without authority" is easily understood when applied to the conversion of tangible property, such as a post office truck or office supplies. This phrase, however, defies clear, consistent and ascertainable meaning when applied to government information. Government information is presumed to be available to the public. Government contractors expect to exchange information with their government customer. In the face of the expectation and presumption of public availablity of government information, criminal liability must be grounded on more than unpublished internal government rules and customs. A fair reading of the statute and the dictates of due process demand that, in the context of government information, the phrase "without authority" requires that the private citizen obtain the

government information in violation of a statute or published regulation.

The exchange of information between contractors and the government is essential to the government's ability to acquire complex electronics in a timely and cost-effective manner. This continuous dialogue between the government customer and its private contractor suppliers is threatened, however, by the concept that private individuals can be held criminally liable for obtaining information whose disclosure violates an unpublished, internal government practice or policy. Amicus EIA recognizes that there exists certain information which for national security or other reasons should not be publically available; its member companies steadfastly adhere to all statutes or published regulations prohibiting the release of specific pieces of information. Nevertheless, to extend criminal liability under 18 U.S.C. §641 to encompass obtaining information whose disclosure is prohibited by internal government rules or customs is contrary to both well established law and sound public policy.

ARGUMENT

I. In The Absence Of Statute Or Published Regulation Prohibiting Disclosure, There Can Be No Criminal Violation For Obtaining Government Information.

When contractors exchange information with government employees, they do so with the understanding that the following syllogism governs their relationship: 1) government information is presumptively available to the public, 2) except where disclosure is specifically prohibited by published law or regulation; 3) therefore, in the absence of a published law or regulation, there can be no criminal violation for obtaining government information. The prosecution's theory here conflicts with this syllogism. The prosecution in this case ignores the reality of the government-contractor relationship and expands criminal

liability for obtaining government information beyond the bounds permitted by statute or the United States Constitution.

1. Government Information Is Presumptively Available to the Public

The presumption throughout American history has been that information possessed by the government is freely available to the citizenry. Except for a few specifically designated areas such as national security affairs, the conveyance of government information is not subject to restriction. In recent years, this principle has been codified in the Freedom of Information Act, 5 U.S.C. §552 (1988), as amended (the "FOIA"), which makes clear that government records and information will generally be made available to the public. The FOIA requires public disclosure of all government records, subject to nine specific exemptions. *See Department of the Air Force v. Rose*, 425 U.S. 352 (1976). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[D]isclosure, not secrecy, is the dominant objective of the [FOIA] Act." *Dept. of the Air Force v. Rose*, 425 U.S. at 460-61.

This general principle extends to government procurements. Industry must work closely with the government to meet the complex procurement demands of the government, and, as a result, government employees constantly provide information to contractors about the government's procurement requirements. The need for exchanges of information in the government procurement process has been acknowledged by Department of Defense officials:

> Because of the nature of the Defense marketplace, with its enormous resource investments, extended research and development efforts and lengthy periods required to get complex weapons systems into

> production, Government and industry share an interest in the affirmative provision of sufficient relevant information regarding the Government's future needs to enable industry reasonably to plan to meet them.

Hearings of Senate Subcommittee On Oversight of Government Management of Governmental Affairs, 101st Cong., 1st Sess. 120 (Feb. 24, 1989) ("Oversight Hearings"), at 73 (testimony of Undersecretary of the Navy H. Lawrence Garrett, III). Assistant Secretary of Defense Wade has voiced similar sentiments, explaining that the Government's goal was not a distant, arm's-length regulatory relationship with contractors, but rather a "close, continuous association of [government] users, developers, the R&D community, and manufacturers." *See* White Paper on DOD Acquisition Improvement, ch. 4, *reprinted in* 44 Fed. Cont. Rep. 1067 (BNA) (1985).

In addition, the government's own written advice to contractors encourages them to obtain information from the "government customer." The Department of Defense in its pamphlet, *Selling to the Military*, advises prospective contractors:

> Interested business firms must help themselves by learning how the Department of Defense conducts its business, and by seeking out those military purchasing offices which buy supplies and services they can supply.
>
> Actually, there is nothing particularly new or different in selling your products or services to the various defense organizations. Basic principles followed in selling within the private sector apply in dealing with the Department of Defense. Two of these principles that are especially appropriate in establishing and keeping a working relationship with military procurement activities are:

> Learn your customer's needs as well as his buying policies and practices.
>
> Follow leads on where buying is done, and search out selling opportunities in all segments of the defense organization.

Department of Defense, *Selling to the Military* 1 (Government Printing Office 1979).

In fact, the need for government contractors to have especially wide access to government information was recognized in the development of the "For Official Use Only" ("FOUO") stamp. Pursuant to published DOD regulations, designating a document as FOUO indicated that a document could "be withheld from the public for one or more of the reasons cited in" the exemptions to FOIA. The published DOD regulations expressly did not prevent exchanges of FOUO-marked information "between DOD components and DOD *contractors*, consultants and grantees." DOD Reg. 5400.7-R, §§4-100, 4-300(a), reprinted in 48 C.F.R. ch. 2, app. L (1987) (emphasis added).

The FOUO legend also is a perfect example of the problems inherent in relying on internal government practices. The rule advocated by the prosecution here opens the way for a confusing maze of conflicting departmental policies and customs. At oversight hearings held by the Senate in 1989, Army and Air Force representatives stated that they relied on the FOUO legend to indicate that a document should not be released to contractors. Navy representatives indicated that their command adopted a different rule allowing disclosure of FOUO documents to contractors. Senate Subcommittee Chairman Levin pointedly noted that DOD's own rules permitted documents marked FOUO to be available to contractors. *See* Oversight Hearing, at 34-37, 59-62. As Senator Levin noted, the marking of documents FOUO left a "big gray area out there [containing] a lot of documents." Id. at 60.

The "big gray area" surrounding FOUO documents is typical of the conflicting rules and practices regarding disclosure of information. Only with promulgation of the regulations implementing the Federal Procurement Policy Act Amendments of 1988 ("Procurement Integrity Act") did there emerge "a single uniform regulation for the Department of Defense regarding dissemination of, and access to, acquisition information." Pub. L. No. 101-189, §822, 103 Stat. 1503. Yet, the Procurement Integrity Act is neither all encompassing, nor necessarily the final word on the disclosure of procurement information. Different agencies and departments may develop their own unpublished internal rules. The inconsistencies and contradictions regarding FOUO documents and the pre-Procurement Integrity Act scheme in general, is symptomatic of the problems inherent in relying on unpublished internal government policies and customs.

2. Criminal Liability Can Be Based On Obtaining Government Information Only Where Disclosure Of The Information Is Specifically Prohibited By Another Statute or Published Regulation

In light of the longstanding policy favoring public access to government information and the close customer-supplier relationship that the government fosters, contractors assume that it is permissible for them to obtain the information provided by government personnel. It is understood that Congress and the executive may carve out exceptions to this general presumption of public access if they so choose. Congress and the executive have plainly shown their ability to prohibit the release of certain specific types of information, for example, passing laws and promulgating regulations prohibiting the disclosure of classified national security information, *see* Exec. Order 12,356, 3 C.F.R. 166 (1982), *reprinted* 50 U.S.C. §401 note (1982),[1] grand jury materials, *see* Fed. R. Crim. P. 6(e), and the names of secret

[1] It should be noted that the decisions in this Circuit upholding §641 convictions based on government information have all arisen in the context

government agents, *see* Intelligence Identities Protection Act of 1982, 50 U.S.C. §421.[2] Absent such a clear public pronouncement that the information in question is not to be disclosed, one should be permitted to assume that government information is properly available to the general public.[3]

Unpublished, internal government rules or practices prohibiting disclosure are too slender a reed to sustain criminal liability for obtaining government information. Section 641 prohibits the conveyance of government property "without authority".[4] When applied to government information, this statute, standing alone, is too vague to survive close scrutiny. In the context of tangible property, the statute's meaning is straightforward. Tangible government property, such as a government vehicle or computer, does not have an underlying presumption of public availability and use. In regard to the intangible of government information, however, the "without authority" language is "virtually devoid of meaning."

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of classified national security information. *See United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988); *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991); *United States v. Truong Vinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982).

[2] *See also* 18 U.S.C. §1902 (crop reports); 18 U.S.C. §1906-1908 (bank examination information); 18 U.S.C. §2511(a)(C) (information obtained through electronic surveillance); 26 U.S.C. §7213 (tax returns). It is also significant to note that Congress has now enacted a statute specifically criminalizing the use of specific types of government procurement information. *See* 41 U.S.C. §423(a) (1991).

[3] One also should be permitted to assume that government personnel are performing their job properly, that is, releasing data which is within their authority to release.

[4] Section 641, in pertinent part, imposes criminal penalties on any person who "knowingly converts . . . or without authority, sells, conveys or disposes of any . . . thing of value of the United States." 18 U.S.C. §641.

> [B]ecause property rights in tangible items are easily discerned, there is little confusion about when a transfer or possession is 'without authority'. In the realm of government records and information, however, there is no established common law of exclusive possession. In addition, the government's interest in secrecy must in every case be carefully balanced against the First Amendment interest in disclosure . . . . *By regulating the disclosure of government information, §641 clearly touches a sensitive constitutional area.* Therefore the need for definiteness is acute. Yet §641 provides no greater guidance as to when disclosure is prohibited than it does in regard to traditionally recognizable possessory interests. *Indeed, the statutory phrase 'without authority' is virtually devoid of meaning when applied to the transfer of information.*

United States v. Lambert, 446 F. Supp. 890, 898 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979).

The case law governing §641 has recognized the problematic nature of the "without authority" language. Consequently, courts have mandated that, in regard to government information, section 641 can only serve as the grounds for a criminal prosecution where the disclosure of the information in question was clearly and expressly prohibited by another statute or published regulation.

> The section must be read as merely establishing a penalty for the violation of other, more particular, prohibitions against disclosure. Thus, the jury may consider only transfers of information affirmatively prohibited by other federal statutes, administrative rules and regulations . . .

Id.[5] *See also United States v. Morison*, 894 F.2d at 1074 (statute is "clarified by government's classification system for national security documents"); *United States v. Jeter*, 775 F.2d 670, 681-82 (6th Cir. 1985) (upholding §641 convictions where appellants violated Fed. R. Crim. P. 6(e) by obtaining secret grand jury information), *cert. denied*, 475 U.S. 1142 (1986).[6]

Employees of government contractors working closely on a daily basis with government employees are entitled to fair warning of their possible criminal exposure when receiving information from government officials. The "without authority" language of §641, by itself, offers no guidance as to what conduct is to be punished in regard to government information. Moreover, with the large number of unpublished internal government rules and practices regarding information dissemination, the potential for selective enforcement is great. In light of the stakes involved — deprivation of one's liberty and curtailment of the exchange of government information — the need for a bright line rule is critical. The only acceptable bright line rule mandates that §641 be applied only where there exists another statute or published regulation prohibiting disclosure of the government information. Anything less than a bright line rule based on the existence of another statute or published

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[5] The *Lambert* court also speculated that "perhaps" longstanding government practices alone could be used to give content to Section 641. We have found no cases, however, where courts have ruled that government practices or customs can serve as the basis for a Section 641 conviction. Moreover, the Second Circuit in affirming *Lambert* specifically referred only to "rules and regulations," which it considered "both a delimitation and clarification of the conduct proscribed by [§641]." *Girard*, 601 F.2d at 71.

[6] This is a paradigmatic case for application of the rule of lenity. "The rule of lenity compels us to construe ambiguous criminal statutes in favor of lenity. The rule promotes fair notice of prohibited conduct and reduces the likelihood that unintentionally criminal conduct will be penalized." *United States v. Hartec Enterprises*, 967 F.2d 130, 133 (5th Cir. 1992) (citations ommitted) (applying rule of lenity to Section 641 and reversing convictions).

regulation prohibiting disclosure would run afoul of the due process clause.

Under the due process clause, a law "must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).[7] Criminal penalties cannot be imposed where the statute "forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Robert v. United States Jaycees*, 468 U.S. 609, 629 (1984)(quoting *Connally v. General Construction Co.* 269 U.S. 385, 391 (1926)); *see also Balthazar v. Superior Court*, 573 F.2d 698, 699-700 (1st Cir. 1978). Because the general presumption holds that government information is publicly available, fair warning under the due process clause requires that the prohibition against disclosure take the form of a statute or published regulation.

To permit government contractors to be held criminally liable based on internal departmental rules or practices also would be inconsistent with the long line of cases holding that a person cannot be held responsible for rules or regulations which are not published in the Federal Register. *See, e.g., Bunge Corp. v. United States*, 5 Cl. Ct. 511, 523 (1984), *aff'd without op.*, 765 F.2d 162 (Fed. Cir. 1985); *D.W. Food Centers, Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1339 (N.D. Cal. 1970), *aff'd*, 472 F.2d 1382 (9th Cir. 1973).[8] Publication in the Federal Register has been deemed necessary "to avoid the inherently arbitrary nature of

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[7] "[A] penal statute [must] define the criminal offense with sufficient definitions that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

[8] "[S]tatutes and case law make clear the requirement that regulations that affect a person's substantive rights [must] be published in the Federal Register." *NI Ind., Inc. v. United States*, 841 F.2d 1104, 1107 (Fed. Cir. 1988).

unpublished *ad hoc* determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Similarly, under §641, the statute or published regulation is necessary to avoid the prospect of criminal liability being premised on an individual's subjective knowledge or, even more dubiously, conscious avoidance of knowledge of some internal departmental policy or practice governing release of certain information.

CONCLUSION

For the reasons set forth above, amicus curiae Electronic Industries Association respectfully submits that the petition should be granted.

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